

**In re: LATINO AMERICANA CARNECERIA.
P.Q. Docket No. 99-0052.
Ruling Granting Complainant's Motion to Dismiss Proceeding filed July 10,
2000.**

Darlene Bolinger, for Complainant.

Respondent, Pro se.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Ruling issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 301.11(b) and 319.56-2ff) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on August 27, 1999.

The Complaint alleges that on or about November 18, 1998, Latino Americana Carneceria [hereinafter Respondent] moved four boxes of Mexican Hass avocados from Chicago, Illinois, to St. Louis, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶ 2).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on September 29, 1999.¹ Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On February 18, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order seeking the assessment of a \$4,000 civil penalty against Respondent.

The Hearing Clerk served Respondent with a copy of Complainant's Motion for Adoption of Proposed Default Decision and Order and Proposed Default Decision and Order on or before March 3, 2000.² Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

¹See Domestic Return Receipt for Article Number P093175131.

²See Domestic Return Receipt for Article Number P 368 427 138.

On May 1, 2000, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that on or about November 18, 1998, Respondent moved four boxes of Mexican Hass avocados from Chicago, Illinois, to St. Louis, Missouri, in violation of the Plant Quarantine Act, the Federal Plant Pest Act, and the Regulations; and (2) assessing Respondent a \$4,000 civil penalty (Initial Decision and Order at 2).

On June 2, 2000, Respondent appealed to the Judicial Officer; on June 22, 2000, Complainant filed Response to Respondent's Appeal Petition; and on June 22, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On June 30, 2000, Complainant filed a motion to dismiss the proceeding against Respondent, and the Hearing Clerk transmitted Complainant's Motion to Dismiss to the Judicial Officer for a ruling.

Complainant's Motion to Dismiss states as follows:

The complaint in this matter, which was filed on August 27, 1999, alleged that on or about November 18, 1998, respondent moved Mexican Hass avocados from Missouri to Illinois in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff. The respondent failed to answer in this proceeding. Respondent also failed to file any objection to the proposed decision and motion for adoption thereof filed on February 18, 2000. On May 1, 2000, Administrative Law Judge Edwin Bernstein issued a Default Decision and Order, which was appealed on June 2, 2000 and is currently pending before the Judicial Officer.

Complainant has since discovered that an earlier complaint had been filed against the respondent, alleging not only the November 18, 1998 violation, but also other violations. That complaint was assigned P.Q. Docket No. 99-0018. Respondent filed an Answer in that proceeding on April 27, 1999. The matter is still pending and no hearing date has been set. A tentative settlement has been reached and should be finalized soon.

In view of the complaint in this proceeding being inadvertently filed, a default is not in the public interest. Therefore, Complainant, with Respondent's concurrence, respectfully requests that P.Q. Docket No. 99-0052, be dismissed.

I agree with Complainant and Respondent that, under the circumstances described in Complainant's Motion to Dismiss, this proceeding instituted against Respondent on August 27, 1999, should be dismissed. Therefore, Complainant's Motion to Dismiss is granted. This proceeding, including the Initial Decision and

Order issued by the ALJ on May 1, 2000, is dismissed. Based on my granting Complainant's Motion to Dismiss, I find Respondent's appeal petition moot. Therefore, I dismiss Respondent's appeal petition.
